Office Supreme Court, U.
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IN THE

Supreme Court of the United States

No. 382

THE FAIRBANKS STEAM SHOVEL COMPANY,
Appellant,

vs.

WILLIAM V. WILLS, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF FEDERAL CONTRACTING COMPANY,
Appellee.

REPLY BRIEF FOR APPELLANT.

Elisha B. Durfee,
Solicitor for Appellant.

John A. Bellatti,
Walter Bellatti,
George B. Scofield,
Of Counsel.

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As bearing on the effect of the provision of Sec. 47, clause 2, of subdivision a, of the Bankruptcy Act, as amended June 25, 1910, for a difference where the property is or is not in the custody of the court, in Illinois, attention is called to the holding there that even before a creditors' bill can be maintained there must be a return of execution **nulla bona**. That is the beginning of another attempt to get hold of something.

Schufeldt v. Boem, 96 Ill., 560, at 563.

Appellant never appeared as creditor in the bankruptcy proceeding and defended only in the controversy arising, as an adverse claimant in possession of the property, claiming to be owner.

It must not be forgotten that this mortgage to The Fairbanks Steam Shovel Co., is a purchase money mortgage where by the contract of purchase the title did not pass to the mortgagor. The title could not pass from the mortgagor to the mortgagee, by even a properly acknowledged and recorded mortgage or by actual change of possession of the property, simply because the mortgagor never had and the mortgagee always had title.

The case now argued by appellee, and the case decided by the courts below, was one where the mortgagor, it was assumed, had title and possession of chattels and borrowed money, and, retaining the possession of the chattels, gave a mortgage not acknowledged or recorded according to the chattel mortgage law. That is not the case to be decided here. The case to be decided here is one where the mortgagee always had and still has title and all the mortgage could be used for was as a memoranda of the notes to be paid before the mortgagor was to get title to the chattel and as a warning to future possible creditors and purchasers so that they could not

take the chattel bona fide. But here there never were such persons to warn. No one gave credit or bought afterwards.

Third Question.

This question of the effect of the filing of involuntary petition in the wrong court and district on the right to take possession of the property under the conditional sale contract, or the mortgage, is not a jurisdictional question, but one on the merits, although the jurisdictional question is involved incidentally in the argument as to the quality or force of the act of filing. The quality or force of the adjudication came after the rights under the taking possession were vested. And until after that time appellant had no notice or knowledge of the filing of the petition. (Record, p. 2.) Notice cannot be imputed from the fact of filing if in the wrong court.

Fourth Question.

This question was sufficiently raised. The court below decided it as though it was very obvious at least. It was raised in fifth exception to report and in seventh and eighth assignments of error in bankruptcy court as well as in assignments here, pages 36-37, Record, and involves the right of the court to exercise jurisdiction by force of having decided that it had jurisdiction of the subject matter, wrong. If jurisdiction depends on the ascertainment of facts it will depend on that, but here the facts were undisputed and the same court in the same proceeding, while it had full control of the whole, found the facts against its jurisdiction of the subject matter. Its finding is not disputed, but its

conclusion is subject to review. That is a question of law.

Louisville Trust Co. v. Cominger, 184 U. S., 18.

Fifth Question.

It is noticeable that appellee's brief, p. 13, in discussing this question does not point out the identity of the New York and the Illinois statute in the particular involved as to the additional statements in the charter here of the postoffice address of the principal office, but contends only for their identity in the one requirement of a statement of "location of principal office." The act approved May 10, 1901, in force July 1, 1901, Hurd's Ill. Rev. Stats., 1909, p. 610, referred to on p. 20 of appellee's brief, provides in paragraph 192 what appellee quotes as from Section 1, and paragraph 193, which would be appellee's Section 2, if it had not been omitted by appellee, provides: "every incorporated company * * * shall **annually** between the first day of February and the first day of March, **report to the secretary of the state the the location of its principal office,**" etc. And by paragraph 197 it is provided that the secretary of state shall on or before the first day of July annually on and after July 1, 1902, **file with the recorder of deeds of each county in each county in the state** a certified list of all corporations of the state which have made the report, **giving this information, "for public reference."**

The agreed statement, Record, p. 7, shows that this bankrupt corporation annually made these reports to the secretary of state of Illinois, giving Beardstown in Cass county as the location of its principal office. This is undisputed proof and also the finding of both courts below that the location of the principal office was, at the

dates of the chattel mortgages, at Beardstown, Cass county, Illinois, even if not originally located there in some legal way, even if not changed, in the legal way, the opinions say it was not. This negation has no basis in the agreed statement or the statement of facts by the referee, page 12, but the negation of the opinions is weakened by his finding on page 13, last paragraph, line 7, from bottom of page up, to wit: "Like most corporations that get into bankruptcy the minutes and records of this corporation were poorly kept and its business informally done." The proceedings may not have been transcribed from paper memoranda to the permanent records.

Seventh Question.

Perhaps the most applicable case on the facts here under this head, is:

Knox vs. Smith, 4 Howard, 298.

A writ of replevin could have been served as soon as the injunction in the case here. The district court, sitting in bankruptcy, has no civil jurisdiction at law, and in plenary suits in equity brought by the trustee, it only has that conferred by Secs. 60b, 67e and 70e. All other jurisdiction, both at law and in equity, is conferred by 23a, now on the District Court, not sitting in bankruptcy.

Bardes v. Bank, 178 U. S., 524.
Mitchell v. McClure, 178 U. S., 539.
Harris vs. First Nat. Bank, 216 U. S., 382.
Bush v. Elliot, 202 U. S., 477.

ON APPELLEE'S CONCLUSION.

On p. 38 of appellee's brief, bottom of page and at top of p. 39, this appears:

"Inasmuch as the trustee takes title to all property which the bankrupt might have conveyed as of the date of the filing of petition the possession taken by appellant was possession taken from the trustee * * *

that the decree of the Circuit Court of Appeals for the Seventh Circuit ought to be affirmed."

Before this court does that it should notice at least whether the allegations of the bill or petition for an injunction are sufficient to support the decree. As recited on page 3, first paragraph, which is headed "3", Record, these allegations seem to fall short and it must be noticed that the "etc." at the end of the recital is after the words "prays an injunction, restraining the sale," and only indicates that other things were prayed for and not that other things were alleged. It is not alleged even that the bankrupt ever had either title or possession of the dredge in controversy.

It is respectfully submitted that said decree should be reversed and the bill or petition for an injunction, at least, ordered dismissed.

Elisha B. Durfee,
Solicitor for Appellant.

John A. Bellatti,
Walter Bellatti,
George B. Scofield,
Of Counsel.

Office Supreme Court U.S.
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JAMES D. MAHER

IN THE

SUPREME COURT OF THE UNITED STATES,

No. [redacted] 379 82

THE FAIRBANKS STEAM SHOVEL COMPANY,
Appellant,

vs.

WILLIAM V. WILLS, TRUSTEE IN BANKRUPTCY, OF THE ESTATE OF FEDERAL CONTRACTING COMPANY,
Appellee.

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF ON BEHALF OF APPELLEE.

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IN THE

Supreme Court of the United States.

No. 926.

THE FAIRBANKS STEAM SHOVEL COMPANY,
Appellant,
vs.
WILLIAM V. WILLS, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF FEDERAL CONTRACTING COMPANY,
Appellee.

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF ON BEHALF OF APPELLEE.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

In consonance with paragraph 3 of Rule 21 of this court, counsel for appellee desire to make their own statement of the case, not so much because they desire to controvert what counsel for appellant have stated, as because of the way they have stated things, and because we believe material statements have been inadvertently omitted or taken out of their logical order and because what we believe to be a clearer and more logical statement will be of material assistance to the court in the consideration of this cause.

This is an appeal from an order of the Circuit

Court of Appeals for the Seventh Circuit affirming an order of the District Court of the United States for the Southern District of Illinois, Southern Division approving the finding and report of the referee in bankruptcy as to the validity of a chattel mortgage given by the Federal Contracting Company, bankrupt.

The way in which the questions to be considered arose, is as follows:

A petition in bankruptcy was filed by three creditors, on December 30, 1912, to have the Federal Contracting Company adjudged bankrupt. The adjudication was contested and after a trial the company was adjudged bankrupt on March 25, 1913. (Printed Record 2.) Meanwhile on March 6, 1913, the appellant, Fairbanks Steam Shovel Company, took possession of a certain steam dredge under a chattel mortgage (which mortgage the trustee alleges to be void, as will hereafter be seen) and proceeded to advertise the same for sale under foreclosure, as provided by Illinois statutes. The sale date was set for March 28, 1913. On March 26, 1913, the bankrupt filed a petition reciting the fact that appellant had taken possession under its chattel mortgage, that sale was about to be had, that the mortgage was void as against the rights of creditors because not properly acknowledged or recorded, and prayed for an order restraining the sale. (Printed Rec. 3.) The court entered an order on the same day and on April 9, 1913, appellant filed its answer in the bankruptcy case, admitting that it had taken possession of the dredge under its mortgage, denying the invalidity of the mortgage, setting up that

it took possession before adjudication, giving the date as March 6, 1913, more than seven weeks after the petition had been filed, and praying for the dissolution of the injunction. (Printed Rec. 3.)

The appellant moved to dissolve the injunction and on the hearing thereof, instead of entering any order, the court, on the stipulation of the parties, gave the appellant leave to proceed with the sale under its mortgage, the right to the fund or to the property to await the decision of the court in the bankruptcy proceedings on the validity of appellant's mortgage. (Printed Rec. 4.)

William V. Wills was elected trustee April 22, 1913, and the petition of the bankrupt, answer of appellant and its motion to dissolve the injunction were referred to the referee to take and report proofs with his conclusions thereon. (Printed Rec. 4.) The parties appeared before the referee, proofs were submitted by both parties to this record and the referee made his report finding the mortgage void as against the trustee in bankruptcy. This report appears in full at pages 11 to 15 inclusive of the printed record. To this report appellant filed exceptions (Printed Rec. 5) which were argued before the Judge of the District Court and on August 21, 1913, the court entered an order overruling the objections and exceptions to the referee's report and approving and confirming the same. (Printed Rec. 16.) Up to this point, at no time or place had appellant, by motion, pleading or suggestion, challenged the jurisdiction of the court.

From the order approving the referee's report, the appellant here prayed and prosecuted an appeal

to the United States Circuit Court of Appeals for the Seventh Circuit. The assignment of errors will be found on pages 18 and 19 of the Printed Record. No error is assigned that the court was without jurisdiction to hear and determine the validity of the mortgage and the right to possession of the mortgaged property.

The question of jurisdiction, though it was raised on oral argument in the Circuit Court of Appeals, nowhere appears on record until the filing of the petition for rehearing on December 2, 1913. This petition was denied on February 17, 1914. It is not made a part of this record and the only evidence that the question of jurisdiction was ever raised, so far as the record shows, is to be found in the ninth assignment of error on the appeal to this court.

The Federal Contracting Co., the bankrupt, is an Illinois corporation. The statutes of Illinois (Chap. 30, Sec. 2) provide that any number of persons, not less than three, nor more than seven, may organize a corporation. They must make, subscribe to and acknowledge a statement to be sent to the Secretary of State, setting forth the proposed name and object of the corporation, its capital stock, the number and par value of shares, the duration of its existence and "the location of its principal office." It is out of this quoted phrase that the real substantial controversy in this cause arises, as will be seen later. Upon receiving this statement, in satisfactory form, the Secretary of State issues a license to open books for subscription to capital stock. When all the stock is subscribed (Chap. 32, Sec. 4) the commissioners to whom license is issued make a report of a meet-

ing to complete organization, called and held pursuant to notice, showing the subscription, how the stock is paid for and the names of the directors for the first year. Section 1 of the act of May 10, 1901 (2 Jones & Addington, Ill. Stat. Ann., p. 1654) provides that every corporation, before receiving a certificate of complete organization shall file with the Secretary of State "a statement setting forth the postoffice address of its business office, giving street and number." Section 4 aforesaid provides that upon filing of the commissioners' report the Secretary of State shall issue a certificate of complete organization "making a part thereof a copy of all papers filed in his office in and about the organization of the corporation."

On September 15, 1905, three persons made and filed in the office of the Secretary of State of the State of Illinois a statement under the above referred to statute for the purpose of organizing a corporation to be called Federal Contracting Company, and therein stating "The location of the principal office is in the City of Chicago, in the County of Cook and State of Illinois." (Printed Rec. 6.) A license was duly issued to open books for subscription to capital stock, the stock subscribed for, the meeting to complete the organization called and held and the commissioners made their report to the Secretary of State, therein stating, *inter alia* "The postoffice address of the business office of said company is at Park Hotel, streets not numbered, in the City of Beardstown, in the County of Cass and State of Illinois." (Printed Rec. 6.)

The company established an office at Chicago in

Cook County, immediately after its organization, but this was abandoned within a few months and all the office effects moved to Beardstown in Cass County, where it maintained an office until the intervention of bankruptcy proceedings, and it never afterwards had an actual office in Cook County. The statute provides a method for changing the location of the place of business of a corporation (Chap. 32, Sec. 50, Hurd's Rev. Stats. Ill.). No steps to comply with this statute were ever taken.

The company's stationery gave its address as Beardstown, all corporate meetings save three were held there and after the first few months the whole business of the corporation was directed from Beardstown. (Printed Rec. 5-6.)

The chattel mortgage in question was given by the bankrupt in renewal of a previous mortgage and to cover a small additional debt. It was dated June 8, 1912, and was acknowledged and recorded in Cass County, Illinois, but not in Cook County, Illinois. (Printed Rec. 8.)

The law of Illinois on chattel mortgages is to be found in Chapter 95 (Hurd's Stats., 1909, p. 1520). Section 1 provides that no mortgage shall be valid as against the rights and interests of third parties unless possession be delivered with the mortgage or the instrument provide that possession remain with the grantor "and the instrument is acknowledged and recorded as hereinafter directed." Section 2 provides that the mortgage "shall be acknowledged before a justice of the peace or county judge of the county were the mortgagor resides" if the mortgagor be a resident of the state. Section 4 provides

that when so acknowledged the mortgage "shall be admitted to record by the recorder of the county in which the mortgagor shall reside at the time when the instrument is executed and recorded."

As we view this case the questions raised and to be here considered are therefore three:

1. Where did the bankrupt corporation reside?

2. Did the District Court have jurisdiction to hear and determine this controversy?

3. Did appellant, by taking possession of the property in question, before adjudication but after the filing of the petition for adjudication, obtain thereby a good title to and right of possession in said property?

BRIEF.

A.

THE RESIDENCE OF THE CORPORATION WAS COOK COUNTY, ILLINOIS, AND THE MORTGAGE WAS THEREFORE NOT ACKNOWLEDGED NOR RECORDED ACCORDING TO LAW.

I.

OUR STATUTE RELATING TO THE ORGANIZATION OF CORPORATIONS HAVING BEEN ADOPTED FROM THE NEW YORK STATUTE, IT MUST RECEIVE THE SAME CONSTRUCTION GIVEN THE SAME OR SIMILAR LANGUAGE BY THE NEW YORK COURTS.

Requa v. *Graham*, 187 Ill. 67, 71.

Rhoads v. *C. & A. R. R. Co.*, 227 Ill. 328.

II.

THE CHARTER OR CERTIFICATE OF COMPLETE ORGANIZATION OF THE CORPORATION FIXES ITS RESIDENCE AND THIS CANNOT BE CHANGED EXCEPT BY FOLLOWING THE METHOD PROVIDED BY LAW.

Hurd's Rev. Stats. Ill. 1909, Chap. 32, Par. 2 and 50 to 54.

Norford Bank for Savings & Trust v. *Godwin*, 86 Fed. 725.

People ex rel. Knickerbocker Press v. *Barker*, 87 Hun (N. Y.) 341, and cases therein cited.

Western Transp. Co. v. *Schea*, 19 N. Y. Rep. 408.

Pelton v. *Northern Transp. Co.*, 37 O. St. 450.

Ex parte Schallenberger, 96 U. S. 369.

First National Bank v. *Wilcox*, 130 Pac. 756, 131 Pac. 203.

III.

THE BANKRUPT CORPORATION WAS A RESIDENT OF COOK COUNTY WHEN THE MORTGAGE IN QUESTION WAS GIVEN.

IV.

THIS MORTGAGE NOT HAVING BEEN ACKNOWLEDGED OR RECORDED ACCORDING TO LAW, IS VOID AS AGAINST THE TRUSTEE.

Hurd's Rev. Stats. Ill. 1911, Chap. 95, Sec. 1, 2, 4.

Frank v. *Minor*, 50 Ill. 444.

Long v. *Cockern*, 128 Ill. 29.

Stephenson v. *Browning*, 48 Ill. 78.

Hammers v. *Dole*, 61 Ill. 307.

B.

DID THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS HAVE JURISDICTION TO HEAR AND DETERMINE THIS CONTROVERSY?

I.

THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS HAD JURISDICTION TO ENTERTAIN THE PETITION FILED DECEMBER 30, 1912, AND TO DETERMINE THE QUESTION OF ITS OWN JURISDICTION.

Bankruptcy Act, Sec. 2 (1).

Denver First National Bank v. *Klug*, 186 U. S. 202.

Smith v. *McKay*, 161 U. S. 355.

II.

THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, HAVING ADJUDICATED THE FEDERAL CONTRACTING COMPANY TO BE A BANKRUPT, THIS JUDGMENT IS FINAL AND BINDING ON THAT CORPORATION AND ITS CREDITORS UNTIL VACATED ON APPEAL OR OTHERWISE.

23 Cyc. 1090 and cases cited in notes from United States courts and thirty-six state courts of last resort.

Remington on Bankruptcy, Sec. 450.

Black on Judgments, Sec. 248.

Chapman v. *Brewer*, 114 U. S. 158.

III.

THE DISTRICT COURT HAD POWER TO HEAR AND DETERMINE THE QUESTIONS INVOLVED IN THIS APPEAL.

Bankruptcy Act, Secs. 2 (7), 2 (15), 23b.

Collier on Bankruptcy (9th Ed.), p. 478.

Dressel v. *North State Lumber Co.*, 5 A. B. R. 744, 107 Fed. R. 255.

IV.

THE PETITION FOR BANKRUPTCY WAS FILED IN THE PROPER DISTRICT.

Dressel v. *North State Lumber Co.*, 5 A. B. R. 744, 107 Fed. R. 255.

In re Marine Machine & Conveyor Co., 1 A B. R. 421, 91 Fed. R. 630.

Collier on Bankruptcy (9th Ed.), 33.

C.

THE FAIRBANKS STEAM SHOVEL CO. DID NOT BY TAKING POSSESSION OF THE MORTGAGED PROPERTY AFTER THE FILING OF THE PETITION AND BEFORE ADJUDICATION VALIDATE AN OTHERWISE BAD MORTGAGE.

I.

THE TITLE TO ALL PROPERTY WHICH THE BANKRUPT MIGHT HAVE DISPOSED OF AT THE DATE OF FILING THE PETITION IS VESTED IN THE TRUSTEE.

Bankruptcy Act, Sec. 70a (5).

II.

ALL PROPERTY OF THE BANKRUPT BECOMES BY THE FILING OF THE PETITION IN CUSTODIA LEGIS.

Jules v. *Frederic Co.*, 27 A. B. R. 136.

Everett v. *Judson*, 30 A. B. R. 1 (U. S. Supreme Ct. Apr. 1913).

Andrews v. *Partridge*, 30 A. B. R. 4 (U. S. Supreme Ct.).

Burlingham v. *Crouse*, 30 A. B. R. 6 (U. S. Supreme Ct.).

Toof v. *City Natl. Bank*, 30 A. B. R. 79 (U. S. C. C. A. 7th Cir.).

III.

THE RIGHTS OF THE TRUSTEE ARE THOSE OF AN ATTACHING OR EXECUTION CREDITOR, HAVING AN UNSATISFIED EXECUTION AT THE DATE OF THE INSTITUTION OF BANKRUPTCY PROCEEDINGS.

Bankruptcy Act, Sec. 47 (2).

Congressional Rec., 61st Congress, 2d Session, pp. 2552-2554.

Collier on Bankruptcy (9th Ed.), pp. 659, 662.

IV.

POSSESSION TAKEN BY THE MORTGAGEE AFTER THE FILING OF THE BANKRUPTCY PETITION IS OF NO AVAIL TO PERFECT HIS TITLE.

Jules v. *Frederic Co.*, 27 A. B. R. 136.

Toof v. *City National Bank*, 30 A. B. R. 79.

BRIEF OF ARGUMENT.

A.

THE RESIDENCE OF THE CORPORATION WAS COOK COUNTY, ILLINOIS, AND THE MORTGAGE WAS THEREFORE NOT ACKNOWLEDGED NOR RECORDED ACCORDING TO LAW.

I.

OUR STATUTE RELATING TO THE ORGANIZATION OF CORPORATIONS HAVING BEEN ADOPTED FROM THE NEW YORK STATUTE, IT MUST RECEIVE THE SAME CONSTRUCTION GIVEN THE SAME OR SIMILAR LANGUAGE BY THE NEW YORK COURTS.

A comparison of the Illinois Act of 1872 relating to the formation of corporations with those of New York prior to that time, discloses a substantial identity as to the statement required to be filed enumerating among other things "location of the principal office." The law is well settled that in adopting a statute from another State, the statute so adopted should receive the construction given to it by the courts of the State from which it is taken, unless such construction is inconsistent with the spirit and operation of our laws.

In *Requa* v. *Graham*, 187 Ill. 67, reading from page 71, the court says, concerning another statute:

> "The provision of the statute above quoted and relied upon by appellants is taken from the New York statute upon the same subject which had before that time been construed by the New York courts. Such being the case, the courts of this state will presumably be governed by such decisions. 'In adopting the statute of another state it is presumed the General Assembly intends that it shall receive the construction given it by the courts of the state from which it is adopted unless such construction is inconsistent with the spirit and policy of our laws.' And no such inconsistency being apparent in the present case, but the construction adopted by the New York courts being in harmony with the general current of authority and with that of our own court we are inclined to follow the decisions of that state."

Western Transportation Co. v. *Scheu*, 19 N. Y. Rep. 408, quoted from below, is the leading authority in New York on what constitutes residence of a corporation.

II.

THE CHARTER OR CERTIFICATE OF COMPLETE ORGANIZATION OF THE CORPORATION FIXES ITS RESIDENCE AND THIS CANNOT BE CHANGED EXCEPT BY FOLLOWING THE METHOD PROVIDED BY LAW.

III.

THE BANKRUPT CORPORATION WAS A RESIDENT OF COOK COUNTY WHEN THE MORTGAGE IN QUESTION WAS GIVEN.

These two propositions, while quite distinct, may best be considered and discussed together.

The Illinois statute on Organization of Corporations requires in the preliminary statement a declaration of the location of the "principal office" (Hurd's Rev. Stats. 1909, Chap. 32, Par. 2), and provides for a method of changing the same, although it there calls it its "principal place of business." (*Id. Par.* 50-54.)

Western Transportation Co. v. *Scheu,* 19 N. Y. Rep. 408, was decided in 1859. The question at issue was where the corporation was taxable, whether at a small village where it kept a nominal office, with its stock books, and where it held its monthly meetings but at which little other business was done, or at Buffalo, where it did most of its business. We quote from page 409:

> "The plaintiff is a corporation organized under the Act of April 15, 1854, for the incorporation of companies to navigate the lakes, etc. (Sess. Laws 1854, 218), the first section of which provides that any five or more persons may form a company by making a certificate in writing and filing the same in the office of the clerk of the county in which the principal office for the management of the business of the company shall be situated in which certificate they are required to state among other things, the name of the city or town and county in which the principal office for managing the affairs of such company is to be situated."
>
> "The certificate filed by the plaintiff * * * contains the following: 'The principal office for managing the financial and other affairs of such company shall be located and situated at the village of Tonawanda * * *.'"

The court goes on to state the facts and continues (p. 410):

> "Under these circumstances it is evident that

unless the certificate filed pursuant to statute is conclusive upon the question of location—if the matter is open to parol proof at all—it is established beyond controversy that the principal office for transacting the financial concerns of the company is not at Tonawanda, but either at New York or Buffalo, probably the latter. The only question then is in regard to the effect as evidence of the statement in the certificate. There are some considerations which seem to me decisive of this question. Unless the legislature intended that the certificate should be conclusive as to the location of the principal office it is difficult to see any adequate motive for requiring the statement to be made. It is in no manner essential to the existence of a corporation that the place of its principal office should be fixed or even that it should have any such office. We can, however, see obvious reasons why it is expedient that corporations should be deemed to have a location for certain purposes, among which is that of taxation; and that this should be definite and certain and not subject to fluctuation or doubt. When the question is left open to parol proof serious difficulties and embarrassments must often arise. * * * To avoid disputes upon the subject was, I apprehend, one motive for requiring the location to be fixed by the certificate."

The other citations under this heading in our brief are uniform. There are to be found cases apparently announcing a contrary doctrine, but in all these cases, if carefully examined, it will be found that there was either no statutory requirement or that the remarks of the court are *dicta*. One further quotation, while purely *dicta* for that case, so well states this view of the law that we presume to quote from it as follows:

"A corporation cannot change its residence

or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter."

Ex parte Schallenberger, 96 U. S. 369.

Paragraphs 50-54, Chap. 32 of Ill. R. S., 1911, provide that the stockholders of a corporation may by special meeting:

"Change the name, * * * place of business, * * * enlarge or change the object for which such corporation was formed * * * increase or decrease the capital stock, * * * change the number of shares of capital stock * * * increase and decrease the par value of shares of capital stock * * * increase or decrease the number of directors, managers or trustees * * * or consolidate said corporation with any other corporation."

By publishing thirty days' notice of such meeting and filing a certificate of the change in the office of the Secretary of State and recording a like certificate:

"in the office of the recorder of deeds of the county where the principal business office of such corporation is located. And upon the filing of said certificate the changes proposed and voted for at such meeting as to name, place of business, enlargement or change of object for which such corporation is formed, increase or decrease of capital stock, increase or decrease of the number of directors, managers or trustees or consolidation with some other company, shall be and is hereby declared accomplished in accordance with the said vote of the stockholders."

"Par. 54. Such corporations shall, upon the filing of said certificate, cause to be published in some newspaper in, or nearest the county in which their principal office is located, a notice of

such changes of organization, for three successive weeks."

No such change is accomplished until such proceedings are had and the certificate of change filed.

Distilling and Cattle Feeding Co. v. *People*, 161, Ill., 101, 104-5 (change of object).

W. Scheidel Coil Co. v. *Rose*, 242 Ill., 484, 487 (consolidation).

In the case of Federal Contracting Co. no proceedings in compliance with this statute were ever taken.

The case of *First National Bank* v. *Wilcox* decided by the Supreme Court of Washington in 1913, 130 Pac., 756, additional opinion on rehearing, 131 Pac., 203, is exactly in point, and we believe it is the only case squarely involving the precise point as to corporate residence for the creation of liens on personal property. The case involved the validity of conditional sale contracts of mill machinery purchased by the corporation. The articles of incorporation designated Tacoma in Pierce County as the principal office or place of business but the business of the company was actually transacted in Chehalis County, to which the officers of the company attempted to change the principal office, and in doing so filed the original articles of incorporation in such county. The chattel mortgage act provided that conditional sale contracts were void against creditors unless recorded in the county "where the vendee *resides*." The contracts in question were recorded only in Chehalis County. After reviewing the statutory provisions requiring the designation of the principal office, or place of business, the opinion reads:

> "We are clear, therefore, that the place designated in the charter of local corporations as their principal office or place of business must be held to be the residence of such corporation. This being true, it follows that the conditional sale contracts were of no effect as to creditors of the vendee because the contracts were not filed in the recorder's office of Pierce County where the vendee resided."

On application for rehearing it was argued that the filing of the articles of incorporation in the new county was notice of the change of residence, but the opinion on rehearing, 131 Pac., 203, holds:

> "The mere filing of the old articles in Chehalis County stating that the residence was in Pierce County did not give notice of the change of residence but had the effect that the residence was not changed."

So, in the case at bar, appellant can take no comfort from the fact that the original articles of incorporation were recorded in Cass County, as such articles gave notice that the residence as a matter of law was at Chicago, in Cook County.

The insertion by the commissioner in their report to the Secretary of State of the postoffice address of the principal business office as at Beardstown, Illinois, did not have the effect of changing the corporate residence because it was not a compliance with the statute; did not have the effect of creating two residences, because the corporation could have only one; and was merely a compliance with another statute requiring annual reports to be made to the Secretary of State and manifestly merely intended to give the Secretary of State a better postoffice address than a mere designation of a city, so that

the notices required by this act to be sent out by him should be certain to reach the corporation intended to be notified. (Act approved May 10, 1901; in force July 1, 1901. Hurd's Ill. Rev. Stats. 1909, p. 610.) This act provides in Section 1: "That every corporation * * * shall, before receiving a certificate of complete organization, file with the Secretary of State a statement setting forth the postoffice address of its business office, giving street and number." And Section 3 provides "The Secretary of State is hereby required, on or before the fifteenth day of January of each year, to mail to every corporation proper blanks to be used in making the report herein provided for," etc. The purpose of Section 1 is therefore clear and unmistakable.

IV.

THIS MORTGAGE NOT HAVING BEEN ACKNOWLEDGED OR RECORDED ACCORDING TO LAW, IS VOID AS AGAINST THE TRUSTEE.

Of course, if this mortgage should have been acknowledged and recorded in Cook County, as being the residence of the mortgagor, its record elsewhere is the same as though it never was recorded, and, the trustee, standing in the position of an attaching creditor as of the date of filing the petition, his lien is superior to that of the appellant. This question of chattel mortgages is a local question and will be governed by Illinois laws. The decisions are uniform that failure to properly acknowledge and record a chattel mortgage, while not affecting its validity between the parties, make it absolutely void

as against creditors and purchasers. One of the earliest cases on this subject is *Stephenson* v. *Browning,* 48 Ill. 78. In that case Browning took from one Sage to secure a debt, a chattel mortgage on a horse. The law then in force required that this mortgage should be acknowledged before a justice of the peace in the precinct where the mortgagor resided. The mortgage was acknowledged before a justice, but of a different precinct and was never recorded. Appellant, a constable holding an execution on a judgment against Sage, had it levied on the horse, before the maturity of the mortgage debt. The court says (p. 80):

> "The mortgage not having been recorded and not being properly acknowledged, the horse was liable to be seized under it (the execution) as the mortgage, whilst binding between the parties, was, in law, fraudulent as to creditors and *bona fide* purchasers. The lien of the execution then attached on the day it issued * * * This lien was superior to the mortgage."

All the other cases on the subject are in line with this one and citation therefrom would be only wearisome reiteration.

If the bankrupt's residence was Cook County, there is no escape from the conclusion that the mortgage is void as against the trustee.

The argument and citations of counsel for appellant on their second proposition or question we submit, with all due deference, are aside from the point. There is no doubt and no question raised that in Illinois conditional sales contracts are good between the parties and it is equally not open to question that they are void as to judgment and attachment

creditors. Indeed the statute on chattel mortgages itself determines and fixes this.

> "No mortgage * * * of personal property * * * shall be valid as against the rights and interests of any third person unless * * * the instrument is acknowledged and recorded as hereinafter directed."
>
> Hurd's Rev. Stats. Ill., 1911, Chap. 95, Sec. 1, page 1520.

> "Such instruments shall be acknowledged before a justice of the peace or the county Judge of the county where the mortgagor resides, or before the clerk or any deputy clerk of any Municipal Court of such county. * * * Provided, however, that in counties having a population of more than 200,000, such instrument, if the mortgagor is a resident of the State at the time of the making of the acknowledgment, shall be acknowledged * * * before the clerk or any deputy clerk of the Municipal Court in the district in which the mortgagor resides."
>
> *Id.*, Sec. 2.

No other liens on personal property except those created in judicial proceedings are recognized in Illinois, as being good as against judgment and attachment creditors. One quotation from the Illinois reports will suffice. There is nothing to the contrary.

> "Where one party, by means of a contract, but without notice to the world, suffers the real ownership of chattels to be in himself and the ostensible ownership to be in another the law will postpone the rights of the former to those of the execution on or attachment creditors of the latter because, to injure third persons by giving false credit to such ostensible owners is the one probable result of the transaction. *Rose*

v. *Story*, 1 Barr, 190; *Martin* v. *Mathist*, 14 Serg. & R. 214; *Stadtfeld* v. *Huntsman*, 92 Pa. St. 53; *Brunswick* v. *Hoover*, 10 Weekly Notes of Cases, 219."

Chickering v. *Bastress*, 130 Ill. 206, 216.

The cases cited in appellants' brief when carefully examined will be found not to be in conflict with this proposition.

In *Ketchum* v. *Watson*, 24 Ill. 592, it appears that Ketchum, a judgment creditor of one Outlaw, levied on a horse which Watson had originally sold to Outlaw, on a conditional sale contract, but the latter, being unable to meet the terms of the contract, reconveyed title while retaining possession with right to purchase. This does not appear clearly in the report, but the testimony is reported "when Outlaw made a conditional contract like the one my father and he had made." The contract referred to is found in the next preceding case. The court below had held the execution creditor took nothing by his levy. The court says (*p. 591):

> "The sale to Outlaw * * * was perfected by delivery to him. The resale by Outlaw to Watson * * * was not perfected by delivery, nor was there any change of possession; the title therefor did not pass. To pass the title as between third persons there must be a change of possession so that others may not be deceived and defrauded by the appearance of ownship in one while the title really is in another. The whole transaction is in fraud of the chattel mortgage act. The judgment is reversed and the cause remanded."

The case of *Van Duzor* v. *Allen*, 90 Ill., 499, cited by counsel for appellant, holds as follows:

> "In the case of *Brundage* v. *Camp*, 21 Ill.

330, there was a full and careful review of the authorities, both English and American, and the rule announced, that where a party sells goods to another and delivers them to the purchaser, although it is agreed the purchaser shall give a note with security at a future day, a sale by the purchaser to another without notice will pass the title to the latter, and he will hold the goods as against the first vendor. It was there said, as the conclusion reached after the review of authorities, that the first vendor having trusted his vendee by making a sale and delivery of the mules to him, and having put it in his power to defraud others by a sale of them, an innocent purchaser of the property for a valuable consideration, without notice, ought to be protected, and the cases of *Morris* v. *Grover*, 2 Scam. 528; *Jennings* v. *Gage*, 13 Ill. 610; *Murch* v. *Wright*, 46 *id.* 487; *McCormick* v. *Hadden*, 37 *id.* 370, and *Michigan Central Railroad Company* v. *Phillips*, 60 *id.* 190, and other cases in this court, all recognize the same doctrine.

A *bona fide* creditor, who, under a judgment and execution acquires a lien on property thus situated, occupies the same position in all respects as does a *bona fide* purchaser. Where the apparent owner of property thus acquired has the indicia of ownership and may sell and pass a good title to a purchaser, without notice, a *bona fide* creditor may seize the property, on execution and sell it thereunder and pass the title, not only against the apparent, but also the real owner. The creditor and purchaser stand on the same footing, and each will be equally protected."

So far as these cases are in point they sustain the position taken by appellee.

B.

DID THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS HAVE JURISDICTION TO HEAR AND DETERMINE THIS CONTROVERSY.

I.

THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS HAD JURISDICTION TO ENTERTAIN THE PETITION FILED DECEMBER 30, 1912, AND TO DETERMINE THE QUESTION OF ITS OWN JURISDICTION THEREON.

The Bankruptcy Act (Sec. 2) provides that District Courts of the United States "are hereby invested within their respective territorial limits * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings. * * * to (1) adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months or the greater portion thereof." That the petition in bankruptcy contained sufficient and apt allegations must be assumed until the contrary appears. On this the record is silent. It is therefore clear that the District Court of the United States for the Southern District of Illinois had jurisdiction to entertain the petition.

The court also had jurisdiction of the parties. Petitioners were creditors having provable claims. This is not denied by the record and must be as-

sumed to be true. It had jurisdiction of Federal Contracting Company, by the latter's appearance and filing of its denial of bankruptcy.

Having thus jurisdiction of the subject matter and of the parties, the court had jurisdiction to determine whether on the facts it had jurisdiction.

The case of *Denver First National Bank* v. *Klug*, 186 U. S. 202, was an appeal prayed by the bank from an order dismissing a bankruptcy petition because debtor was in one of the excepted classes. The court holds that the appeal was not properly brought to the Supreme Court because there was no proper certificate and says (p. 404): "Moreover, the District Court had and exercised jurisdiction. The conclusion was, it is true, that Klug could not be adjudged a bankrupt, but the court had jurisdiction to so determine and its jurisdiction over the subject matter was not and could not be questioned."

The case of *Smith* v. *McKay*, 161 U. S. 355, while not a bankruptcy case, well illustrates the general principle in a few words. It is there said (p. 358):

> "When the requisite citizenship of the parties appears and the subject matter is such that the Circuit Court is competent to deal with it, the jurisdiction of that court attaches and whether the court should sustain the complainant's prayer for equitable relief or should dismiss the bill with leave to bring an action at law, either would be a valid exercise of jurisdiction. If any error were committed in the exercise of such jurisdiction it could only be remedied by an appeal to the Circuit Court of Appeals."

II.

THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, HAVING ADJUDICATED THE FEDERAL CONTRACTING COMPANY TO BE A BANKRUPT, THIS JUDGMENT IS FINAL AND BINDING ON THAT CORPORATION AND ITS CREDITORS UNTIL VACATED ON APPEAL OF OTHERWISE.

This proposition is believed to be elementary. It is stated in 23 Cyc. 1090, in the following language:

> "Where a court has jurisdiction of the parties and of the subject matter its judgment, although irregular in form or erroneous or mistaken in law, is conclusive so long as it remains unreversed and in force and cannot be impeached collaterally."

We must assume, because the record is silent on these questions, that the petition had sufficient and apt allegations, that the parties were properly before the court, and that the court found it had jurisdiction to enter the order of adjudication. These facts are not denied by appellant.

Fairbanks Steam Shovel Company was a creditor of the bankrupt and therefore bound by the adjudication until it was vacated or reversed. This court has expressed itself definitely on this proposition in *in re American Brewing Co.*, 7 A. B. R. 469, 112 Fed. R. 752, in the following language:

> "If it were necessary in order to bind creditors by a judgment in bankruptcy, that they should appear and answer, as they always have a right to do, then an adjudication could be prevented simply by creditors abstaining from appearing in the proceedings. But it is well set-

> tled that the proceedings are in a large sense *in rem* and are binding whether the creditors appear or not."

It is urged that appellant did not have actual notice of the pendency of the petition until after adjudication. But they did acquire such notice within a very few days thereof and could have petitioned for an appeal or for a vacation thereof and a rehearing. Collier on Bankruptcy (9th Ed.) 434.

This proceeding is collateral to the bankruptcy proceeding and the judgment of adjudication cannot be attacked herein. See *Huttig Mfg. Co.* v. *Edwards*, 20 A. B. R. 349, (U. S. C. C. A., 8th Circ.), where it is said (p. 353):

> "The manufacturing company attacks the validity of the adjudication that I. Winter was a bankrupt upon the ground that one of the three petitioners in the involuntary proceedings was not a creditor, but since the attack was made in a proceeding by the trustee to annul a preference, it is a collateral and not a direct one. An adjudication of bankruptcy is entitled to the same verity and is no more to be impeached collaterally than other judgments or decrees of courts of competent jurisdiction. It cannot be assailed by the defendant in a suit by the trustee to recover or avoid a preference upon the ground that one of the petitioners was not in fact a creditor of the bankrupt. When the record shows jurisdiction the adjudication of bankruptcy is subject to impeachment only by a direct proceeding in a competent court." Citing *Michaels* v. *Post*, 21 Wall. 398; *Sloan* v. *Lewis*, 22 Wall. 150.

The case of *Chapman* v. *Brewer*, 114 U. S. 158, is almost on all fours with the case at bar. There, as here, a bankruptcy petition was filed against debt-

ors who appeared and filed an answer denying bankruptcy, a trial was had and adjudication entered. The distinction between that case and the case at bar, if there be any, is that the assignee in bankruptcy, the matter being under the law of 1867, brought an independent suit to set aside levies on judgments made within the proscribed time. On page 169 the court says:

> "If the District Court had jurisdiction of the subject matter and the bankrupt voluntarily appeared and the adjudication was correct in form it is conclusive of the fact decreed and can be impeached only by a direct proceeding in a competent court and can no more be attacked collaterally in a suit like the present than any other judgment."

The fact that the attempted attack is made in proceedings had on a petition filed in the bankruptcy court and cause to restrain the disposition of property alleged to belong to bankrupt's estate, does not change its character as a collateral proceeding.

The case of *Huttig Mfg. Co.* v. *Edwards, supra,* is in point. That was a proceeding instituted by the trustee in bankruptcy to have declared invalid certain mortgages because taken within the proscribed time with reasonable cause to believe the bankrupt insolvent. The proceedings were had in the course of the administration of the bankrupt estate and were held to be collateral to the proceeding for an adjudication. See also *In re Hecox,* 21 A. B. R. 314, 164 Fed. R. 823 (C. C. A., 8th Circ.) also a proceeding to recover property, instituted in the course of the administration of the bankrupt estate, before the referee.

III.

THE DISTRICT COURT HAD POWER TO HEAR AND DETERMINE THE QUESTIONS INVOLVED IN THIS APPEAL.

The Bankruptcy Act (Sec. 2) provides that courts of bankruptcy shall have power to "(7) cause the estates of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto, except as herein otherwise provided."

The exception relates to property held and claimed adversely. (Bankruptcy Act, Sec. 23b.)

The property in question having been taken possession of after the filing of the petition in bankruptcy, the possession was not adverse and the District Court had jurisdiction to entertain the proceedings. Collier on Bankruptcy (9th Ed.) 478.

But even if the possession were adverse, the appellant came into court and expressly consented to the hearing of its claim by the District Court (Printed Rec., 4) and cannot now claim that the court had no jurisdiction to hear the controversy.

IV.

THE PETITION FOR BANKRUPTCY WAS FILED IN THE PROPER DISTRICT.

Counsel for the trustee do not believe this question is involved on this appeal. It seems conclusive, as heretofore argued, that if the judgment of the District Court was wrong, it was not void, but only

erroneous. We might admit, for the purposes of argument, that Federal Contracting Company did not reside, have its domicile or its principal place of business within the Southern District of Illinois. The presumption on this record is that the court found at least one of these propositions to be the fact as to the bankrupt. And there is no dispute about the fact. Bankrupt had a place of business in Cass County, in the Southern District of Illinois, and had no other place of business. The question argued on the appeal, so far as the validity of the chattel mortgage is concerned, is not where was bankrupt's principal place of business but where was its residence. And to this is added the further query as to whether the residence of a corporation is a question of fact or a question of law, and if purely a question of law fixed by its charter or certificate of complete organization, where does this fix its residence? Counsel for the trustee confidently affirm that cases cited in appellant's brief are aside from the point. The issue on the question of jurisdiction is not solely a question of residence nor is it open to question where the principal place of business was. Its affairs were all conducted and controlled from the Southern District of Illinois.

The case of *Dressel* v. *North State Lumber Co.*, 5 A. B. R. 744, 107 Fed. R. 255, is clearly in point. This was a partnership consisting of two residents of New York City, and one of Detroit, Michigan. Its recorded articles fixed its principal office at Detroit, but its property was all located in the Eastern District of North Carolina. The court held that the principal office did not fix the principal place of business.

The case of *White Mountain Paper Co.* v. *Morse & Co.*, 127 Fed. 643 (U. S. Circ. Ct. App., 1st Circ.) cited in appellants' brief holds "no point being made as to the fact that the 'principal place of business' of the corporation is in New Hampshire the District Court probably had jurisdiction under Section 2 of the Act of July 1, 1898." (The Bankruptcy Act.)

Possibly the District Court for the Northern District of Illinois might have maintained jurisdiction, but the court for the Southern District having obtained jurisdiction and no dispute arising between creditors as thereto, it cannot here and now be questioned.

C.

THE FAIRBANKS STEAM SHOVEL CO. DID NOT BY TAKING POSSESSION OF THE MORTGAGED PROPERTY AFTER THE FILING OF THE PETITION AND BEFORE ADJUDICATION VALIDATE AN OTHERWISE BAD MORTGAGE.

I.

THE TITLE TO ALL PROPERTY WHICH THE BANKRUPT MIGHT HAVE DISPOSED OF AT THE DATE OF FILING THE PETITION IS VESTED IN THE TRUSTEE.

II.

ALL PROPERTY OF THE BANKRUPT BECOMES BY THE FILING OF THE PETITION IN CUSTODIA LEGIS.

III.

THE RIGHTS OF THE TRUSTEE ARE THOSE ON AN ATTACHING OR EXECUTION CREDITOR, HAVING AN UNSATISFIED EXECUTION AT THE DATE OF THE INSTITUTION OF BANKRUPTCY PROCEEDINGS.

IV.

POSSESSION TAKEN BY THE MORTGAGEE AFTER THE FILING OF THE BANKRUPTCY PETITION IS OF NO AVAIL TO PERFECT HIS TITLE.

While each of the foregoing propositions stands by itself, they are, in the cases dealing with them

treated together for the most part and are, therefore, so grouped here.

While, in Illinois, generally, by the terms of the mortgage the title usually vests in the mortgagee, with the right to possession, as in a conditional sale contract, postponed to and conditioned upon some default, a mortgage is not good as to purchasers or judgment creditors until it is properly acknowledged and filed for record. (See *ante* this brief, under B IV.) This sufficiently answers the contention of counsel for appellant that the bankrupt had no title which inured to the trustee. As to the secondary proposition that the trustee's position is as of the date of adjudication instead of the date of filing the petition, it is suggested that all the cases relied upon by counsel for appellant were all decided before the amendment of 1910 and that amendment was passed to correct what were deemed to be the injustice and hardship of the law as interpreted by the Supreme Court.

Section 70a (5) of the Bankruptcy Act provides that the trustee is vested with the title to all property of the bankrupt "which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him."

In *State Bank* v. *Cox*, 16 A. B. R. 32, 36, the Circuit Court of Appeals for the Seventh Circuit declares that:

> "bankruptcy proceedings are *in rem* and when commenced all of the property then held by the bankrupt or for his use (aside from exemptions) is subjected to the jurisdiction of the Bankruptcy Court and that when bankruptcy is adjudicated the sequestration reaches all such property, at least, and becomes operative from

the institution of the proceedings as '*a caveat* to all the world,' preventing interference by attachments or other means in derogation of the interests of the state. * * * While the title rests in the bankrupt up to adjudication, and in form until a trustee qualifies, it is subject to the pending sequestration and no rights can be acquired thereunder which are not equally amenable."

"Prior to the amendment of 1910 the trustee was not clothed with the privileges of a judgment creditor. The trustee's title as against a claim under an unrecorded conditional sale, though the state law required record, did not prevail. It was to obviate this, among other things, that Section 47, clause 2, sub-section a of the act was amended by inserting the words 'And such trustees as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor, holding a lien by legal or equitable proceedings thereon.' And also as to all property not in the possession of the Bankrupt Estate shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

Congressional Record, 61 Cong., 2d Sess., page 2552-4.

"The purpose of Congress was to embrace within these words every class of creditors with liens by legal or equitable proceedings favored by the varying registration laws of each of the states. * * * If property coming into the custody of the court be claimed by another, the trustee is vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon. * * *

It seems that this language might have found a more appropriate place in Section 70 of the act, but however that may be, it is plain that

the two sections must now be construed together and that the trustee can no longer be said to have the limited title of the bankrupt. He no longer stands in the shoes of the bankrupt. Decisions holding that a trustee has no other right than belonged to the bankrupt, are no longer controlling."

Collier on Bankruptcy, 9th Ed., pp. 659, 662.

And the case of *Jules* v. *Frederic Co.*, 27 A. B. R. 136 (U. S. D. C. Mass.), is quite on all fours with the case at bar.

The following are the facts in that:

Chattel mortgage was given March 2, 1909.

Creditors' petition was filed May 26, 1909.

Mortgage was given for a present consideration of $1,500 and a past consideration of $4,175.00. It was never recorded.

March 2, 1909, mortgagee took possession.

May 24, 1909, all goods attached by another creditor.

On May 24th, deputy sheriff and mortgagee both went into possession.

May 26th, 9:20 a. m., creditors' petition was filed and deputy sheriff withdrew, but mortgagee's representative remained in the store until the mortgaged property was sold.

May 27, 1909, the court enjoined mortgagee from disposing of the property until further order of the court.

June 9, 1909, petitioning creditors and mortgagees stipulated property might be sold and respective rights of parties to proceeds afterwards determined.

The court holds that the taking of possession by mortgagee on March 2d, was ineffective; as to the possession taken on May 24th, the court says:

"The deputy sheriff's possession while it lasted, was exclusive and it continued until the filing of the petition in bankruptcy under which there

has been an adjudication. I must hold that no possession taken after the filing of the petition can avail the mortgagee. *State Bank* v. *Cox* (C. C. A. 7th Cir.), 16 Am. B. R. 32, 143 Fed. 91, 93; *Cruchet* v. *Red Rover Co.* (C. C. Mass.), 18 Am. B. R. 814, 155 Fed. 486; *Clays* v. *Waters* (C. C. A. 8th Cir.), 24 Am. B. R. 293, 178 Fed. 388, 394."

Moreover, since the cases decided by the Supreme Court in April and June, 1913. *Everett* v. *Judson; Andrews* v. *Partridge* and *Burlington* v. *Crouse,* all to be found in 30 A. B. R. at pages 1, 4 and 6 respectively, there is no longer room for doubt that, as is said in *Toof* v. *City National Bank,* 30 A. B. R. 79:

"When a trustee is appointed his title is fixed, by relation, as of the time of filing the petition, and not merely as of the date of adjudication."

CONCLUSION.

In this case appellant seeks redress on three untenable and inconsistent positions.

It first says its mortgage is good because the corporation resided in Cass County, Illinois. (Fifth question, appellants' brief.) On this proposition both the District Court and the Circuit Court of Appeals have held against appellant and we respectfully submit that under the law as set out in the foregoing brief and argument these counts were correct.

Secondly appellant says the court was without jurisdiction to hear and determine the controversy because the bankrupt did not reside in the Southern District of Illinois. (Third, fourth and sixth questions, Appellants' brief.)

It was not necessary for the bankrupt to reside there. It had had its principal place of business there for more than six months next preceeding the date of filing the petition. The present proceeding is collateral to the bankruptcy proceeding. The adjudication and the right of the court to entertain the petition for adjudication cannot be attacked in this proceeding. Appellant also contends that even if the court did have jurisdiction for this purpose it did not have jurisdiction to determine the validity of defendant's title and right of possession. Inasmuch as the trustee takes title to all property which

the bankrupt might have conveyed as of the date of filing the petition, the possession taken by appellant was possession taken from the trustee, and even if appellant had not submitted its controversy to the court, the court had jurisdiction to take from appellant property which when seized by it was in fact and in law already *in custodia legis*.

Appellant's third proposition is that if its mortgage is not good the taking possession before adjudication made its title and right of possession good. Appellant could not take effectual possession from the trustee except by authority of the court and inasmuch as the trustee stands in the right of a judgment or attachment creditor as of the date of filing of the petition his lien is superior to appellant's secret lien or reservation of title by its so-called conditional sale and by its failure to properly acknowledge and record its chattel mortgage. We therefore respectfully submit that the decree of the Circuit Court of Appeals for the Seventh Circuit ought to be affirmed.

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